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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 622

RALPH D. ABERNATHY, ET AL.,
Petitioners,

vs.

JOHN PATTERSON, INDIVIDUALLY AND AS GOVERNOR OF ALABAMA, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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RALPH D. ABERNATHY, ET AL.,
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vs.

JOHN PATTERSON, INDIVIDUALLY AND AS GOVERNOR OF ALABAMA, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on October 31, 1961.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 83-95), printed in Appendix B hereto, *infra*, pp. 15-25, is unreported. The order of the District Court (R. 74-77), printed in Appendix B hereto, *infra*, pp. 27-29, is likewise unreported.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 31, 1961 (R. 96). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Where state and local officials are alleged to have engaged in a conspiracy to deprive Negro citizens of constitutional rights, and where some of the overt acts in furtherance of the conspiracy are similar to the acts involved in *Hague* v. *C. I. O.*, 307 U. S. 496, 83 L. Ed. 1423 (1939), is the equitable jurisdiction of a federal court barred by virtue of the acts of the conspirators in bringing and prosecuting allegedly fraudulent libel actions in a state court, with respect to which a right of appeal exists?

2. Where a complaint alleges a conspiracy in violation of the Civil Rights Acts to deprive Negro citizens of constitutional rights, and where the overt acts alleged in furtherance of the conspiracy include the systematic breaking up of peaceful meetings and demonstrations against segregation, can it be said that plaintiffs have an adequate remedy at law and have suffered no irreparable injury simply because they have a right to appeal from the $500,000 libel judgments obtained against them by defendants acting pursuant to the same conspiracy?

3. Does Section 2283 of Title 28 of the U. S. Code bar equitable relief against the prosecution and enforcement of state court libel judgments allegedly obtained in furtherance of a conspiracy of state and local officials to deprive Negro citizens of their constitutional rights in violation of the Civil Rights Acts?

STATUTES INVOLVED.

The statutory provisions involved are two sections of the Civil Rights Acts, namely, Sections 1983 and 1985 (3) of Title 42, U. S. Code, and the so-called "anti-injunction" statute, Section 2283 of Title 28, U. S. Code. These provisions are printed in Appendix A, *infra*, pp. 13-14.

STATEMENT.

The four petitioners, Negro ministers, filed a complaint in the United States District Court for the Middle District of Alabama on February 20, 1961 (R. 1). The complaint alleged that certain state, county, and local officials in Alabama, who were named as defendants, joined in an illegal conspiracy to deprive plaintiffs of rights, privileges, and immunities secured them by the Constitution of the United States (R. 3-4; 7). Specifically, the complaint charged that it was the purpose of the conspiracy "to deprive the plaintiffs and others of the equal protection of the laws and of their equal privileges and immunities under the laws and from exercising their rights and privileges as citizens of the United States * * * and to deprive the plaintiffs of their rights to access to a free press, free speech and peaceful assembly as well as the right to petition for redress of grievances guaranteed to them under the * * * Constitution" (R. 7).

In furtherance of the conspiracy, the complaint alleged that the defendants prevented the holding of peaceable meetings in which petitioners sought to engage and systematically broke up demonstrations against segregation. The complaint also alleged that defendants adopted a program of unreasonably harassing Negro citizens in Montgomery by such means as unwarranted arrests, shows of force by massed police, and the surveillance of and physical intrusion of police into meeting places (R. 9-10; 44; 47-49; 51-53; 55-56). In addition, and as part of the conspiracy, the

Alabama public officials instituted groundless libel actions against petitioners and proceeded to obtain two fraudulent judgments in the amount of $500,000 each (R. 9-11).*

These libel suits were filed by four of the defendants (respondents here), namely, the Governor of Alabama, the Mayor of Montgomery, the Chief of Police of Montgomery, and the member of the Montgomery Board of Commissioners having responsibility for Public Affairs. The claimed libel was based entirely upon a publication, inserted as an advertisement, in the New York Times on March 29, 1960 (R. 23). The New York Times advertisement expressed the opinions of many prominent Americans with respect to developments in a number of Southern communities, including Montgomery, and solicited support for the defense of the Reverend Martin Luther King, Jr. and for the petitioners and their supporters. Petitioners seek equality of treatment for members of the Negro race through Christian and non-violent constitutional means (R. 6-7).

The complaint alleged that the $500,000 judgments were without foundation in law or fact and were designed to punish plaintiffs for their efforts to further the equality of treatment for members of the Negro race and to deter others from engaging in similar efforts (R. 11-13).

The complaint alleged that the judgments were based on verdicts rendered without fair trials, in a highly prejudicial community atmosphere, in a court room in which the segregation of Negro and white citizens was enforced by the specific order of the presiding judge, and without a scintilla of legally relevant evidence sufficient to support them

* The judgments can only be characterized as monstrosities. Cf. *Caldwell* v. *Crowell-Collier Pub. Co.*, 170 F. 2d 941, 944 (C. A. 5th 1948). Two of the libel cases (Parks and Patterson) were removed by the defendant New York Times to the District Court. Motions to remand were denied, the court holding that the joinder of the individual defendants (petitioners here) was "fraudulent" in the removal sense, since the evidence showed that they had nothing to do with the advertisement in the Times (R. 87).

(R. 13-15). Petitioners alleged that they were unable to post the $2,000,000 supersedeas bonds required to stay execution on the judgments pending appeal, and that, in consequence, they have been subjected to the measures taken by respondents to enforce the judgments against petitioners' real and personal property (R. 16).

The complaint prayed for an injunction enjoining defendants from levying on petitioners' property on the basis of the libel judgments obtained, from proceeding to trial in the remaining libel actions, and "from engaging in the aforesaid conspiracy designed to deter and prohibit the plaintiffs from exercising rights guaranteed by the 1st and 14th Amendments with respect to freedom of speech, press, assembly, the right to petition for redress of grievances, and the right to free worship" (R. 16-19).

The defendants moved to dismiss on the grounds that the court lacked jurisdiction over the subject matter, that the complaint failed to state a claim upon which relief could be granted, that the petitioners did not pursue their state remedies in litigation then in progress in the state courts, and that the court "may not exercise jurisdiction to enjoin or to review private damage suits for a common law libel previously commenced, and in some instances already reduced to judgment, in the state Courts of Alabama" (R. 68-69; 73-74).

The District Court granted the motions to dismiss, without hearing any evidence, stating that it "is not without authority to grant the relief prayed for if the circumstances are found to so justify it" but that "the circumstances of this case do not require or justify the Court's intervention" (R. 75-76). The District Court also noted that the complaint sought to litigate matters then pending in the state court "with the right to a review of the actions of the State Court ultimately by the Supreme Court of the United States" (R. 76), Appendix B, *infra*, p. 29.

The Court of Appeals for the Fifth Circuit affirmed, but on quite different grounds: "We conclude that the plaintiffs will suffer no such irreparable damage as would justify injunctive relief, and that they have a plain, adequate and complete remedy at law" (R. 95), Appendix B, *infra*, p. 25.

REASONS FOR GRANTING THE WRIT.

1. This case presents issues of importance in the enforcement of the Civil Rights Acts against conspiracies aimed at depriving Negroes of constitutional rights. According to the allegations of the complaint, public officials in Alabama, acting in concert, broke up peaceful public meetings and used the threat of force to prevent Negro citizens from exercising their rights peaceably to assemble, petition for redress of grievances, and to worship. In this respect, the complaint contains allegations similar to those involved in *Hague* v. *C. I. O.*, 307 U. S. 496, 83 L. Ed. 1423 (1939). In addition, the complaint in the present case alleges that the Alabama public officials took a further step in their conspiracy against petitioners and others associated with them: as part of the conspiracy they instituted and prosecuted baseless libel actions in a "concerted effort * * * to punish individual citizens for the exercise of constitutional rights * * *" (R. 12).

Had petitioners simply alleged the actions of the public officials whereby meetings were broken up and threats of violence made against Negro citizens, asserting that these were part of a conspiracy to deprive petitioners and others of their constitutional rights, it can hardly be doubted that equity jurisdiction would have been properly invoked. Petitioners would have had no adequate remedy at law; their injuries would have been irreparable in nature.

The decision of the court below does not consider what

remedy petitioners have with respect to such allegations. Rather it simply ignores them. It assumes that the only problem petitioners face is the threat of enforcement of the $500,000 libel judgments. Thus the end result of the court's decision is to view the conspiracy alleged in the complaint as nothing more than a conspiracy to obtain and enforce the libel judgments. Since, according to the court, all the issues raised in the complaint as to the libel actions can be determined on review in the Alabama Supreme Court, and since any property levied upon pending review will be returned to petitioners together with interest in the event of reversal, petitioners are said to have an adequate remedy at law and to have suffered no irreparable injuries.

There is no doubt that a conspiracy of public officials to deprive citizens of their rights, privileges, and immunities in violation of the Civil Rights Acts is subject to federal injunctive power. The question squarely presented by this case is this: may such state officials, by including among the acts in furtherance of the conspiracy a resort to state courts, thereby achieve their purposes without risking the equity power of a federal court acting under the Civil Rights Acts? Would the plaintiffs in *Hague* v. *C. I. O.* have had an adequate remedy at law had Mayor Hague and his cohorts also brought trumped-up libel suits against them?

This Court should issue the writ in order to consider whether state officials can circumvent the express prohibitions of the Civil Rights Acts by the device of using state court procedures and processes in furtherance of a conspiracy to deprive Negro citizens of constitutional rights.

2. The decision of the Court below flouts the fundamental rule of equity jurisdiction that a legal remedy barring resort to a court of equity "must be as complete,

practical, and efficient as that which equity could afford." *Terrace* v. *Thompson*, 263 U. S. 197, 214, 68 L. Ed. 255, 274 (1923). The court below notes the rule (R. 92) and then proceeds to ignore it. How it can possibly be said that appeals from the libel judgments afford as complete a remedy to petitioners as a federal court proceeding under the Civil Rights Acts is beyond comprehension. The issues in the libel actions are much narrower; no claim of a broad conspiracy to violate the Civil Rights Acts is involved; and the only relief petitioners can hope for—by appeal—is a reversal of the judgments and the eventual return of the levied-upon property or its value, plus interest. Relief against the state and local officials who, in the style of Mayor Hague in *Hague* v. *C. I. O.*, have systematically interfered with petitioners' lawful anti-segregation activities, is out of the question.

This Court adheres to the rule that "a remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity." *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 520, 61 L. Ed. 1280, 1291 (1917), subsequently quoted in *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 629, 90 L. Ed. 358, 366 (1946).

The remedy at law referred to by the court below does not and could not cover the entire case. All it could do is to achieve the reversal of the unconscionable libel judgments. It could not begin to redress the substantial deprivations of constitutional rights alleged in the complaint. It could not prevent the continuing repression of constitutional rights already achieved by respondents' acts in furtherance of the conspiracy. The Alabama Supreme Court may reverse the libel judgments and order that petitioners be made whole on account of any of their property levied upon. But how can the Alabama Supreme

Court (or this Court in review of the libel judgments) restore the constitutional rights already interfered with, or provide a remedy for the damage to petitioners' anti-segregation cause already occasioned by respondents' conspiracy?

Fundamental rights inhibited or repressed are lost irreparably. Further and continuing losses can only be prevented by restraining those responsible for the inhibition or repression. It is no real remedy to have a court hold that one act of repression—one of many carried out pursuant to a conspiracy—was improperly imposed. The basic rights can be secured only by extirpating the conspiracy.

3. The case presents important questions as to the proper construction of Section 1983 of Title 42 of the United States Code, particularly the language which makes every person who, under color of state law, subjects any citizen of the United States to the deprivation of constitutional rights, privileges and immunities, "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The court below has held that, regardless of allegations of a conspiracy and regardless of allegations that actions were taken in furtherance of that conspiracy to prevent the exercise by petitioners of their constitutional rights, no equitable relief can be granted if, with respect to a part of acts performed by the conspirators, it may be said that the petitioners have complete redress in the state courts through the procedures of appeal. In effect, according to the court below, certain kinds of state action—namely, state court judgments and state court proceedings to enforce those judgments—may not be reached by the equitable powers of federal courts acting under Section 1983 of Title 42.

But this conflicts with the views of the Court of Appeals

for the Seventh Circuit in *Progress Development Corp.* v. *Mitchell*, 286 F. 2d 222 (C. A. 7th 1961), where, among other things, the plaintiffs sought to enjoin proposed state court condemnation proceedings by park district officials. In *Progress*, as here, it was alleged that the state court actions were part of a conspiracy to deprive individuals of this right in violation of the Civil Rights Acts. In reversing the District Court in *Progress*, the Court of Appeals held that the plaintiffs did not have an adequate remedy at law. 286 F. 2d 222, 231-32 (1961).

If threatened state court condemnation proceedings may be enjoined where in furtherance of a conspiracy in violation of the Civil Rights Act, why are libel suits, exorbitant libel judgments, and executions thereon immune? It seems hardly credible that the situations are wholly different simply because in *Progress* the plaintiffs filed in the federal court just *before* the park district officials commenced their condemnation proceedings, whereas here petitioners sought federal court relief under the Civil Rights Acts *after* defendants sued for libel.* If this is the essential distinction, then conspirators bent upon circumventing the Civil Rights Acts would do well to heed the words of Macbeth:

> If it were done when 'tis done, then 'twere well
> It were done quickly * * * (Act I, Scene VII).

The Court of Appeals for the Seventh Circuit is prepared to recognize that, realistically, "persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law" (*Bottone* v. *Lindsley*, 170 F. 2d 705, 707 (C. A. 10th 1948)). The court below apparently believes that such a course of action by Alabama state officials is, as

* It is difficult to believe that the so-called anti-injunction statute, Section 2283 of Title 28 of the U. S. Code (Appendix A, *infra*, p. 14) bars injunctive relief in the present case—but not in *Progress*—simply on the basis of who won the race to the court house.

a matter of law, inconceivable. Regardless of the intent and purpose of the Alabama libel judgments obtained against petitioners and regardless of the context of conspiracy in which they are set, the individuals thereby injured have every protection the law affords by taking an appeal: *this is what the court below has held.*

To permit this view to prevail is to encourage state and local officials to subvert the state courts for the improper purpose of depriving Negro citizens of their constitutional rights. If the decision below remains unreviewed, the scope of Section 1983 of Title 42 is perceptibly narrowed.

4. The decision of the court below is contrary to decisions of other courts of appeal and, indeed, of the Court of Appeals for the Fifth Circuit itself: the decision construes the complaint narrowly and technically, despite the acknowledged rule that complaints charging violations of the Civil Rights Acts are to be liberally construed. The Courts of Appeal for the Second and Fourth Circuits have held that a complaint charging violations of the Civil Rights Acts should not be dismissed unless it is absolutely certain that the plaintiff would be entitled to no relief under any facts that might be proved in support of the claim. *Burt* v. *City of New York*, 156 F. 2d 791, 792 (C. A. 2d 1946); *Henry* v. *Greenville Airport Com'n.*, 279 F. 2d 751, 752 (C. A. 4th 1960). The Court of Appeals for the Fifth Circuit has recently expressed the same view. *Lewis* v. *Brautigam*, 227 F. 2d 124, 127 (C. A. 5th 1955). The court below noted the rule (R. 91-92) and then proceeded to disregard it by narrowly construing the complaint as though it pleaded nothing but the libel actions and judgments.

This Court has had occasion to discuss the special solicitude the federal court should show for claims that federally-protected rights have been invaded. *Bell* v. *Hood*, 327 U. S. 678, 681-83, 684, 90 L. Ed. 939, 944 (1946).

Yet the court below, in denying equitable jurisdiction, must have concluded that "by no possibility [could] the plaintiff[s] have a claim" against the defendants. *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (C. A. 2d 1947). To reach that conclusion the court treated essential parts of the complaint as though they were not there. Instead of showing solicitude for the federally-protected rights being invaded —by the local police, by threats of violence, and by the brazen misuse of the state courts—the court below showed remarkable solicitude for the technicalities of pleading claims for equitable relief.

This Court should issue the writ in order to consider whether charges of violations of the Civil Rights Acts may be eviscerated in such fashion.

CONCLUSION.

For the foregoing reasons it is urged that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

The Complaint based its request for relief upon two provisions of one of the Civil Rights Acts, Sections 1983 and 1985 (3) of Title 42.

Section 1983 of Title 42 of the United States Code provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This section is R. S. § 1979 and was enacted as Section 1 of the Act of April 20, 1871 (17 Stat. 13). In the fifth edition of the United States Code (U. S. C., 1952 ed.), it was transferred from Title 8 (8 U. S. C. 43) to its present classification in Title 42.

Section 1985 (3) of Title 42 of the United States Code, insofar as here relevant, reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such

> conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1985 is R. S. §4980 and was enacted as Section 2 of the Act of April 20, 1871 (17 Stat. 13). In the fifth edition of the United States Code (U. S. C., 1952 ed.), this section was transferred from Title 8 (8 U. S. C. 47) to its present classification in Title 42.

Also involved is Section 2283 of Title 28 of the United States Code:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

APPENDIX B.

Opinions and Judgments Below.

IN THE UNITED STATES COURT OF APPEALS

For the Fifth Circuit.

No. 19023

RALPH D. ABERNATHY, ET AL.,
Appellants,

versus

JOHN PATTERSON, Individually and as GOVERNOR OF ALABAMA, ET AL.,
Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

(October 31, 1961)

Before RIVES and WISDOM, *Circuit Judges*, and CARSWELL, *District Judge*.

RIVES, *Circuit Judge*: The complaint filed by four Negro ministers describes this action as "a suit of a civil nature to redress the deprivation under color of state law, statutes, ordinances, regulations, custom or usage, of rights, privileges and immunities secured by the Constitution of the United States and by Acts of Congress providing for equal

rights of citizens and all persons within the jurisdiction of the United States." It states that the action is brought under the Constitution of the United States, Article IV, Section 2, and the 13th, 14th and 15th Amendments to the Constitution, and under 28 U. S. C. A. 1331(a) and 1343(3) and (4), and under 42 U. S. C. A. § 1983 and 1985(3). The defendants, sued individually and as officers, are the Governor of Alabama, the Mayor Montgomery, the Commissioner of Police of Montgomery, the Commissioner of Public Affairs of Montgomery, and the Sheriffs of four Alabama counties—Montgomery County, Mobile County, Jefferson County and Marengo County.

The complaint alleges that each of the plaintiffs, individually and through his association with various named organizations and in association with other persons, "under the spiritual leadership of the Reverend Martin Luther King, Jr., has for some time sought to advance the equality of treatment of members of the Negro race through Christian and non-violent constitutional means. Accordingly, the purpose of the plaintiffs, individually, and the associations they have been identified with as leaders, has been to achieve for themselves individually and for the Negro citizens of this State and the country the full enjoyment of the privileges and immunities guaranteed to all citizens under the provisions of the Constitution of the United States." The complaint then charges that, "in or about February 1960, several of the defendants and divers others co-conspirators, the names of whom are to the plaintiffs presently unknown, entered into a conspiracy, individually and under the authority of their offices, to prevent the plaintiffs and others from accomplishing their objectives as aforesaid and to deprive the plaintiffs and others of the equal protection of the laws and of their equal privileges and immunities under the laws and from exercising their rights and privileges as citizens of the

United States, and to deprive them of their rights, privileges and immunities secured by the Constitution and laws of the United States and entered into a conspiracy to deprive the plaintiffs of their rights to access to a free press, free speech and peaceful assembly as well as the right to petition for redress of grievances guaranteed to them under the 1st Amendment of the Constitution, as incorporated in the 14th Amendment thereto."

Proceeding, the complaint details a number of instances in which it is alleged that Negro students and Negro citizens of Montgomery have been denied rights guaranteed to them by the Constitution and laws of the United States. It then alleges that on or about March 29, 1960, "supporters of the plaintiffs and the movement for equality which they lead" inserted in the New York Times a paid advertisement purporting to be signed by eighty persons, many of them prominent Americans from various walks of life. A copy of the advertisement is attached as an Exhibit to the complaint. It is captioned "Heed Their Rising Voices," and urges contributions to a "Committee to Defend Martin Luther King and The Struggle for Freedom in the South." A part of the advertisement makes specific reference to Montgomery, Alabama, as follows:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and teargas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Following the names of those sponsoring the advertisement is a line reading: "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal."

which in turn purports to be signed by twenty ministers including the four plaintiffs. The complaint then alleges:

> "The defendants herein at some time thereafter conspired and planned under the color of law and utilizing their official positions, as well as the judicial machinery of the State, to deter and prohibit the plaintiffs and their supporters as set forth above, from utilizing their constitutional rights and in particular their right to access to a free press, by instituting fraudulent actions in libel against the plaintiffs, without any basis in law or fact, in the Alabama State courts, arising out of the aforesaid advertisements. Said libel actions were also against the New York Times."

According to the complaint, separate libel suits were instituted by Governor Patterson, Mayor James, and Commissioners Sullivan and Parks. Mayor James' and Commissioner Sullivan's actions have proceeded to judgment in the Circuit Court of Montgomery County, Alabama, damages in the amount of $500,000.00 having been awarded to each of them against the four Negro ministers and The New York Times. It is alleged that to stay execution pending appeals in the two cases, the plaintiffs are required under Alabama law to post supersedeas bonds in the aggregate amount of $2,000,000.00, which they are financially unable to do. Plaintiffs are, in addition, "subjected to preparation for further trials in the Parks and Patterson cases, which are still pending * * *."[1]

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1. In their briefs both the appellants and the appellees go beyond the record. We are informed that since the dismissal of this action, the judgment in the Sullivan case has been appealed to the Supreme Court of Alabama; the James case is pending in the State trial court on a motion for new trial; and the Parks and Patterson cases have been removed to the United States District Court for the Middle District of Alabama; that that court has denied motion to remand, holding that Parks and Patterson had fraudulenty joined as defendants the four resident Negro ministers who are plaintiffs in this action; and that this Court has allowed appeals from those interlocutory orders under 28 U. S. C. A. § 1292(b).

Irreparable damage is alleged as follows:

"Accordingly, plaintiffs are subjected to immediate and irreparable injury and loss:

"(a) They are subjected to the immediate loss and damages as a result of levies and attachments of all of their property, both real and personal, which they own, individually as well as jointly, and

"(b) Unless this Honorable Court gives relief the plaintiffs herein and the Negro citizens of the State of Alabama will be deterred from using the media of a free press and all other rights guaranteed under the 1st Amendment, as incorporated in the 14th Amendment, to present the injustices to which they have been submitted."

The averment as to lack of an adequate remedy at law is:

"The plaintiffs have no plain, adequate and complete remedy at law which can protect the plaintiffs' rights of freedom of expression, of press and assembly, and unless this Court gives relief, plaintiffs will be further relegated to a segregated Court system. The plaintiffs have not and cannot under the present segregated organization of the Alabama State Courts, receive a fair and impartial trial.[2] Therefore, recourse to such a system would be no remedy at all consistent with the guarantees of the Constitution."

The relief prayed for is as follows:

"Wherefore, plaintiffs respectfully pray:

"1. That this Learned Court enter a permanent injunction:

"(a) Enjoining defendants, their agents, servants,

2. The facts alleged in the complaint and its exhibits to sustain this conclusion are confined to the State trial court. It is charged that the Sullivan and Jones cases were tried in a courtroom in which segregation of Negro and white citizens was enforced pursuant to order of the presiding judge and over the objections of counsel for the plaintiffs herein, who were unable to obtain a fair and impartial trial because of the highly prejudicial atmosphere in the community.

employees and attorneys, from levying upon plaintiffs' property both real and personal, which has already been attached, as well as all future levies.

"(b) Enjoining defendant from proceeding with trials presently pending and which are instituted by the defendants, John Patterson and Frank Parks.

"(c) Restraining each of the defendants named herein, their agents, employees or attorneys, from engaging in the aforesaid conspiracy designed to deter and prohibit the plaintiffs from exercising rights guaranteed by the 1st and 14th Amendments with respect to freedom of speech, press, assembly, the right to petition for redress of grievances, and the right to free worship.

"2. That this Learned Court make, declare and enter a declaratory judgment, declaring the judgments awarded to the defendants Sullivan and James to be null and void.

"3. That this Learned Court, in the meantime, enter an Order Pendente Lite, enjoining the defendants herein, their agents, servants, employees and attorneys: —

"(a) From proceeding with all sales of automobiles and other personal property which has been attached and is about to be sold pursuant to present levies, including garnishments, and from proceeding to the selling of or the otherwise encumbering of or disposing of property of the plaintiffs in satisfaction of judgments entered in cases No. 27416 and 27417, which are pending before the Circuit Court of Montgomery County, Alabama, pending disposition of this action; and

"(b) From proceeding in any manner whatsoever with the libel actions in the Circuit Court of Montgomery County, Alabama, entitled 'Frank Parks *v.* New York Times Company, a corporation, et al.' and 'John Patterson v. New York Times Company, a corporation, et al.'"

Concurrently with the filing of the complaint, the plaintiffs moved for a preliminary injunction to prevent the

levy upon and sale of their property in satisfaction of the two $500,000.00 judgments. On the same date, the district court denied the motion for preliminary injunction, stating:

> "It appearing to the Court that the plaintiffs have wholly failed to seek any relief from the Circuit Court of Montgomery County or from any of the named defendants, it is the opinion of this Court that said request for a preliminary injunction is not well taken.
>
> "It further appears that the plaintiffs herein have had sufficient notice of the judicial sale of plaintiffs' real and personal property and have wholly failed to make a prayer for relief in the Courts of the State, with the ultimate right to request relief in the Supreme Court of the United States. It is the further opinion of the Court that this request for relief, being filed herein within twenty-four hours of the date of the alleged public sale, comes too late. It is the opinion of the Court, therefore, that plaintiffs' request for relief should be denied."

Some ten days later the plaintiffs renewed their motion for a preliminary injunction, and the district court again denied that motion.

Thereafter, the defendants filed motions to dismiss the action. Those motions to dismiss were sustained by the district court without a formal opinion, but with the following statements:

> "While this Court is not without the authority to grant the relief prayed for if the circumstances are found to so justify it, the Court is of the opinion that although vested with the authority to redress the deprivations of rights guaranteed to all citizens under the Constitution and laws of the United States, the circumstances of this case do not require or justify this court's intervention. * * *
>
> * * * * *
>
> "As this Court has repeatedly held, the State Courts, as well as the federal judiciary, are under a sworn duty

to uphold the Constitution of the United States and the citizens' rights thereunder, and this Court will not presume that the Courts of the State will not uphold this sworn obligation. *Browder* v. *City of Montgomery*, 1956, 146 F. Supp. 127; *N.A.A.C.P.* v. *Gallion, et al.*, 1960, [190]F. Supp. [583]; *Cherry Investment Co.* v. *Emergency Aid Insurance Co.*, 1961, M. D. Ala., Civil Action No. 707-S."

This appeal is from the judgment dismissing the complaint. The test by which we review such a dismissal is indeed strict:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Conley v. *Gibson*, 1957, 355 U. S. 41, 45, 46. This Court has held that test applicable to a complaint drawn under 42 U. S. C. A. § 1983. *Lewis* v. *Brautigam*, 5 Cir., 1955, 227 F. 2d 124, 127. In the present case, however, that test must be applied in the light of the facts that the only relief possibly appropriate, and the only relief for which the plaintiffs pray is the equitable remedy of injunction; and, before dismissing the complaint, the district court had twice denied the plaintiffs' motion for preliminary injunction.

Upon this appeal, we consider first whether, under the ordinary principles of equity, the plaintiffs have shown irreparable damage and the absence of a plain, adequate and complete remedy at law.[3] Unless and until the plaintiffs have stated a claim entitling them to injunctive relief on the basis of regular equitable principles, it is both unnecessary and inappropriate for us to decide such delicate

3. See *Terrace* v. *Thompson*, 1923, 263 U. S. 197, 214; 1 Moore's Federal Practice, pp. 2639, 2640.

and important questions of federalism as might then be presented by the application of the anti-injunction statute, 28 U. S. C. A. § 2283, and its related judicial rule of comity.

As has been noted (*ante*, p. 4), the plaintiffs' claim of irreparable injury and loss is based (1) upon the claim that "the plaintiffs and the Negro citizens of the State of Alabama will be deterred from using the media of a free press and all other rights guaranteed under the 1st Amendment, as incorporated in the 14th Amendment, to prevent the injustices to which they have been submitted"; and (2) upon the claim that the plaintiffs "are subjected to the immediate loss and damage as a result of levies and attachments of all of their property, both real and personal, which they own, individually as well as jointly."

As to (1), the plaintiffs' claim must be confined to themselves to the exclusion of other Negro citizens for, as was conceded upon the oral argument, this is not a class action. Libelous utterances or publications are not within the area of constitutionally protected speeches and press.[4] The plaintiffs' claim that they will be deterred from using the media of a free press must therefore be predicated upon their claims of denial of a fair and impartial trial of the libel actions and the absence of a plain, adequate and complete remedy at law.

As to (2), the claim that plaintiffs are subjected to the immediate loss of their property as a result of levies and attachments, that claim can best be considered in connection with the plaintiffs' further claim that they have no plain, adequate and complete remedy at law. As has been noted (*ante*, p. 5), the latter claim is predicated upon

4. *Near* v. *Minnesota*, 1931, 283 U. S. 697, 715; *Chaplinsky* v. *New Hampshire*, 1942, 315 U. S. 568, 571, 572; *Beauharnais* v. *Illinois*, 1952, 343 U. S. 250, 256; *Roth* v. *United States*, 1957, 354 U. S. 476, 483; *Konigsberg* v. *State Bar of California*, 1961, 366 U. S. 36, 50.

the conclusion that, "The plaintiffs have not and cannot, under the present segregated organization of the Alabama State Courts, receive a fair and impartial trial." Of course that sweeping conclusion cannot be accepted unless it is well supported by specific factual averments. As has been further noted (ante footnote 2), the supporting allegations of fact are confined to the State trial court. We pass by the fact that the only thing now pending in the State trial court is a motion for new trial in the James case (see footnote 1, *supra*). We pretermit also consideration of whether extraordinary remedies are available to the plaintiffs under the laws of Alabama. For we are of the opinion that the ordinary methods of review by the Supreme Court of Alabama and, ultimately, by the Supreme Court of the United States provide the plaintiffs with a plain, adequate and complete remedy at law.

Under the laws of Alabama, when a litigant considers that a judgment is contrary to the law or the evidence, or that the damages awarded are excessive, he may, without furnishing any supersedeas bond, file a motion for new trial within thirty (30) days from the entry of judgment. Alabama Code of 1940, Title 7, Section 276. If the trial court refuses to grant a new trial, an appeal lies to the Supreme Court of Alabama. Alabama Code of 1940, Title 7, Sections 764, 811. True, in Alabama an appeal from a judgment for the payment of money does not operate as a supersedeas, or to stay or suspend execution of the judgment, unless the appellant gives bond with sufficient sureties in double the amount of the judgment. Alabama Code of 1940, Title 7, Section 793. Under the averments of the complaint, the required supersedeas bond in each of the two cases which have proceeded to judgment is $1,000,000.00, or an aggregate of $2,000,000.00. We may well accept the plaintiffs' averments that they are unable financially to post supersedeas bonds in the amount of $2,000,000.00. If,

however, the judgments are reversed on appeal, the plaintiffs herein will be entitled to restitution of any money paid or property taken.[5]

Finally, if the plaintiffs herein should not be satisfied that their constitutional rights are adequately recognized and protected by the Supreme Court of Alabama, they may then seek review in the Supreme Court of the United States.

We conclude that the plaintiffs will suffer no such irreparable damage as would justify injunctive relief, and that they have a plain, adequate and complete remedy at law. The judgment is therefore

AFFIRMED.

5. "It must be regarded as the settled law of this state that a party who pays money, or is dispossessed of property by process on a judgment or decree afterwards reversed on appeal is in general entitled as of right to restitution of the money paid or the property taken, so as to be placed in statu quo with respect to his rights and advantages previous to the erroneous judgment. *Marks* v. *Cowles*, 61 Ala. 299; *Ex parte Walter Bros.*, 89 Ala. 237, 7 South. 400, 18 Am. St. Rep. 103; *Florence C. & I. Co.* v. *Louisville Banking Co.*, 138 Ala. 588, 36 South. 456, 100 Am. St. Rep. 50; *Lehman-Durr Co.* v. *Folmar*, 166 Ala. 325, 51 South. 954.

"The right may be enforced by the incorporation of an appropriate order in the judgment or decree of reversal (*Marks* v. *Cowles*, *supra*; *Lehman-Durr Co.* v. *Folmar*, *supra*); or summarily by motion in the trial court (*Ex parte Walter Bros.*, *supra*; *Cowdery* v. *London, etc., Bank*, 96 Am. St. Rep. 142, note); or by a supplemental bill of review, if in equity (*McCall* v. *McCurdy*, 69 Ala. 71); or by a distinct, independent action (*Haebler* v. *Myers*, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589; *Cowdery* v. *London, etc., Bank*, *supra*, 96 Am. St. Rep., note p. 143)."

Carroll v. *Draughon*, Ala., 1911, 56 So. 209, 210.

Jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. § 1331(a), 28 U. S. C. A. §§ 1343(3) and (4), 42 U. S. C. A. § 1983, 42 U. S. C. A. § 1985(3), and under the Constitution of the United States, Article IV, § 2, and the Thirteenth, Fourteenth and Fifteenth Amendments thereto.

While this Court is not without the authority to grant the relief prayed for if the circumstances are found to so justify it, the Court is of the opinion that although vested with the authority to redress the deprivations of rights guaranteed to all citizens under the Constitution and laws of the United States, the circumstances of this case do not require or justify this Court's intervention. Further, the Court is of the opinion that the complaint in this case violates the provision of Rule 8(e), Federal Rules of Civil Procedure, which provides that each averment of a pleading shall be simple, concise and direct. The complaint in this case is unduly prolix, and contains much redundant, immaterial and impertinent matter, and is subject to be stricken. Rule 12(f), Federal Rules of Civil Procedure.

However, this Court does not base its ruling upon the fact that the complaint is violative of Rule 8(e), Federal Rules of Civil Procedure. The substantial ground for denying the relief sought by the plaintiffs is that the complaint fails to set out circumstances which would warrant this Court's assuming jurisdiction.

As this Court has repeatedly held, the State courts, as well as the federal judiciary, are under a sworn duty to uphold the Constitution of the United States and the citizens' rights thereunder, and this Court will not presume that the courts of the State will not uphold this sworn obligation. *Browder* v. *City of Montgomery*, 1956, 146 F.

Supp. 127; *N. A. A. C. P.* v. *Gallion, et al.*, 1960, ____ F. Supp. ____; *Cherry Investment Co.* v. *Emergency Aid Insurance Co.*, 1961, M. D. Ala., Civil Action No. 707-S.

It affirmatively appears in this case that the plaintiffs seek to have litigated in this Court matters which are pending in the State court, with the right to a review of the actions of the State court ultimately by the Supreme Court of the United States.

It is, therefore, the opinion of the Court that the motions to dismiss this action filed herein by Earl James, L. B. Sullivan, Frank W. Parks, Mac Sim Butler, John Patterson, Ray D. Bridges, Holt A. McDowell and Wilmer Shields, defendants in the above-styled cause, should be and each of said motions to dismiss is hereby granted.

It is the further ORDER, JUDGMENT AND DECREE of the Court that the costs of this cause be and the same are hereby taxed against the plaintiffs, for which execution may issue.

Done, this the 17th day of March, 1961.

FRANK M. JOHNSON, JR.,
United States District Judge.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 622.

RALPH D. ABERNATHY et al.,
Petitioners,

v.

JOHN PATTERSON, Individually and as
Governor of Alabama, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

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OPINIONS BELOW.

The order and opinion of the United States District Court of March 17, 1961 (App. B of Petition, pp. 27-29) is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit of October 31, 1961 (App. B of Petition, pp. 15-25), is reported at 295 F. 2d 452.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 31, 1961. Respondents are not advised of the date of filing of the Petition for Writ of Certiorari, but a copy was received by counsel for Respondents on December 22, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. When the only claimed invasion of a person's constitutional rights is that he has been sued for private civil damages in a state court for libel, and judgment has been rendered against him there, do the Civil Rights Acts entitle him to a federal injunction against further prosecution of the libel litigation and to federal district court review of the libel judgment? Or, must he, instead, utilize usual state appellate processes, admittedly adequate to make him whole if his appeal is successful, with review ultimately in the Supreme Court of the United States of any federal question properly preserved and presented?

2. Are libelous utterances within the area of constitutionally protected speech and press? Do the Civil Rights Acts immunize publishers of libels from private state court libel suits by making available to them federal injunctions against such suits?

3. Does a federal suit to enjoin the trial of four pending state private civil libel suits; to review and set aside two judgments in the suits, one pending in the state's highest court; and to block the execution of the judgments, seek a federal injunction prohibited by 28 U. S. C. 2283 and its underlying considerations of federalism?

4. Do the Civil Rights Acts entitle a disappointed state court litigant to a federal court re-trial on general and unsupported allegations of fraud and conspiracy?

STATUTES INVOLVED.

In addition to the anti-injunction statute, 28 U. S. C. 2283, and two sections of the Civil Rights Act, 42 U. S. C. 1983 and 1985 (3) (App. A of Petition, pp. 13-14), there are also involved the following sections of Title 7, Code of Alabama, 1940: 276, 792-794. (These sections are set out in Appendix A of this Brief.)

STATEMENT.

Petitioners seek review because the District Court dismissed their complaint (R. 74-77) and the Court of Appeals affirmed. This complaint of February 20, 1961 asked the District Court to review and enjoin private damage suits for common law libel previously commenced by respondents Sullivan, James, Parks, and Patterson in the state court of Montgomery County, Alabama. The libel actions of Sullivan and James had already been reduced to judgment against petitioners and a codefendant, The New York Times Company. Earlier respondents Sullivan, James, and Parks had filed private suits for libel against The New York Times and these petitioners on April 19, 1960 (and respondent Patterson sometime thereafter) because of the publication and subsequent distribution in Alabama and elsewhere of a paid advertisement in The New York Times of March 29, 1960, on which petitioners' names appeared as endorsers (R. 23).[1] Seeking to invoke the jurisdiction of the District Court under various statutory and constitutional provisions,[2] petitioners asked a

[1] As the Court of Appeals observed (295 F. 2d at 454, n. 1), since the dismissal below, The New York Times has appealed the Sullivan judgment to the Supreme Court of Alabama, thus transferring jurisdiction of that case to the Supreme Court of Alabama; and petitioners, by a paper filed in the state circuit court on April 27, 1961, sought to join in that appeal. (The appeal was argued and submitted in the Supreme Court of Alabama on December 19, 1961.)

The James case is pending in the state trial court on a motion for new trial. The Parks and Patterson cases have been removed to the United States District Court for the Middle District of Alabama, and review has been granted by the Fifth Circuit under 28 U. S. C. 1292 (b) of the District Court's refusal to remand these cases (295 F. 2d at 454, n. 1).

The other respondents are Alabama sheriffs, presumably joined as defendants below because Sullivan had sought to levy execution on his judgment.

[2] 28 U. S. C. 1338 (a); 28 U. S. C. 1343 (3) and (4); 42 U. S. C. 1983 and 1985 (3); Constitution of the United States, Article IV, § 2, and Amendments 13, 14 and 15.

declaration that the Sullivan and James judgments already entered on state jury verdicts were void; attempted to block by injunction the legitimate execution of these judgments which had not been superseded or stayed in accordance with applicable state law;[3] and sought an injunction against the trial of the Parks and Patterson cases insofar as the petitioners were concerned. The complaint, characterized by the District Court as "unduly prolix and contain[ing] much redundant, immaterial, and impertinent matter",[4] was held not to "set out circumstances which would warrant this Court's assuming jurisdiction" (R. 76; App. B of Petition, p. 28). Moreover, the District Court held:

> "It affirmatively appears in this case that the plaintiffs seek to have litigated in this Court matters which are pending in the State Court, with the right to a review of the actions of the State Court ultimately by the Supreme Court of the United States" (R. 76).

The Court of Appeals, upon petitioners' concession that the action in the District Court was not a class action, confined petitioners' claims "to themselves to the exclusion of other Negro citizens" (295 F. 2d at 456).

Considering whether "under the ordinary principles of equity (petitioners) have shown irreparable damage and the absence of a plain, adequate, and complete remedy at law",[5] the Court of Appeals held that since the only facts asserted in support of any claimed exercise of a constitutional right by petitioners concerned the publication of

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[3] Title 7, §§ 792-794, Code of Alabama, 1940.

[4] This observation was clearly designed to cover, *inter alia*, §§ 18-24 of the complaint (R. 7-10) and the 24-page affidavit (R. 32-56) which purported to describe events alleged to have occurred from February 25 to April 9, 1960—a period which ended before the state libel suits were filed; almost six months before the Sullivan trial; almost nine months before the James trial; and almost a year before the filing of the complaint itself.

[5] 295 F. 2d at 456.

the paid advertisement in The New York Times, the constitutional claim depended on whether the state libel trials were fair and whether there were adequate means of review in the Supreme Court of Alabama and ultimately in this Court. The Court of Appeals concluded that petitioners "will suffer no such irreparable damage as would justify injunctive relief, and that they have a plain, adequate and complete remedy at law" (295 F. 2d at 458).

Accordingly, the Court of Appeals also held that "it is both unnecessary and inappropriate for us to decide such delicate and important questions of federalism as might . . . be presented by the application of the anti-injunction statute, 28 U. S. C. A., § 2283, and its related judicial rule of comity" (295 F. 2d at 456).

Without alleging any facts which under the most generous construction related any details of the libel actions, much less defenses to them,[6] the complaint characterized these state libel suits arising out of The Times advertisement said to have been inserted by "supporters" of petitioners to solicit for them and Martin Luther King, Jr. (R. 10-11), as "fraudulent actions" and "without any basis in law or fact" (R. 11), and brought by respondents Patterson, Sullivan, James, and Parks in their "governmental capacity" (R. 16) to "enrich them" (R. 15).[7] The judgments in the Sullivan and James cases are called "fraudulent" (R. 11); and it is said that the verdicts "are an unconstitutional usurpation of judicial machinery

[6] Not even the pleadings in the state action are attached or described; none of the testimony is discussed, even in the most general way; no theories of liability or defense are mentioned.

[7] Sullivan, James and Parks, municipal officers, had to sue privately for damages. A city, as a municipal corporation, has no standing to sue for libel. *City of Chicago v. Chicago Tribune Co.*, 307 Ill. 395, 139 N. E. 86, 28 A. L. R. 1368; *City of Albany v. Meyer*, 99 Cal. App. 651, 279 P. 213; *Mayor of Manchester v. Williams* (1891), 1 Q. B. 94. *A fortiori* the State of Alabama has no standing, and Patterson's suit is also private.

(by respondents)" (R. 16). These judgments are termed "null and void" on the following grounds, which carefully avoid the merits of the state court actions: (a) the suits "punished" petitioners in the "exercise of their right to comment"; (b) during a portion of the James case, courtroom spectators were segregated (R. 13);[8] (c) celebrations of the Civil War Centennial in Montgomery in 1961 created a prejudicial atmosphere (presumably for the James trial, since the Sullivan trial had already concluded), and produced verdicts which "could only have been the result of the passionate (sic) prejudice revived by the celebration and other events embraced within the Civil War, among others" (R. 15); and (d) the verdicts were without support in evidence (R. 15).[9]

The complaint contains not a hint that these matters, except for spectator seating in the James case, were presented in the state trial court or that motions for a continuance or change of venue were sought. Nowhere in the complaint or the petition here is there the slightest suggestion that in either the Sullivan or James trials, these petitioners, or indeed The New York Times, even attempted to introduce any testimony to substantiate the truth of the matters contained in the paid advertisement.

Belatedly, in the appellate courts, petitioners have tried to characterize their complaint as something more than an attempt to seek judicial review of pending state libel actions in a federal District Court. While the petition talks

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[8] The petition (p. 4) inaccurately states that the complaint charged courtroom segregation in the Sullivan case. It did not; its allegation concerned only part of the James case (R. 13 and 24-29).

[9] The petition here (footnote *p. 4) refers to a District Court opinion on denial of a motion to remand the Parks and Patterson cases. This opinion was not part of the record in the Court of Appeals, and is incorrectly said to have been. However, the Court of Appeals has permitted interlocutory review of it under 28 U. S. C. 1292 (b). 295 F. 2d at 454, n. 1.

in vague and amorphous terms about the denial of petitioners' constitutional rights by respondents, the complaint, as painstakingly analyzed in the opinion of the Court of Appeals, and indeed the petition itself, reveal no overt acts relating to petitioners other than the libel suits.

All allegations of irreparable damage relate to the libel suits (295 F. 2d at 454). The only averment as to the adequacy of legal remedy concerns the libel actions and their trial (295 F. 2d at 454). The entire prayer for relief seeks to enjoin the enforcement of libel judgments obtained; to enjoin the trial of the libel actions still untried; to obtain a declaration that the two judgments already entered are null and void; and to restrain, *pendente lite*, the execution of judgments and the trial of pending actions.[10]

The complaint, itself, which was filed on February 20, 1961, and the motion for preliminary injunction filed on March 1, 1961 (R. 59), followed by almost a year or more any of the events described in the complaint and the attached affidavit. Except for the institution of the libel actions, and with the limited exception of the Abernathy march of March 6, 1960, there are no allegations in the complaint or in the attached affidavit that any respondent committed any overt act relating to any of the petitioners.

Petitioners concede that this is not a class action. And no person involved in the allegations of events which the

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[10] While par. 1 (c) of the prayer for relief is couched in general terms and asks that the respondents be restrained from denying petitioners' rights guaranteed by the 1st and 14th Amendments, as the Court of Appeals pointed out, the only averment in the complaint remotely relating to the exercise of such rights by these petitioners, as distinguished from others not parties to the suit, concerns the publication of the paid advertisement in The New York Times. While Petitioner Abernathy is said to have been deterred from marching on the State Capitol in the company of 1,000 others on March 6, 1960 (R. 8-9), this event antedated the filing of the complaint by almost a year (R. 1) and involved no other petitioner and no respondent except Sullivan.

District Court characterized as "unduly prolix and contain[ing] much redundant, immaterial, and impertinent matter," is a party to this case.

Two of the petitioners do not reside in Montgomery (R. 2); three of the sheriffs reside in counties of Alabama other than Montgomery (R. 3); and one of the respondents is the Governor of the State.

To state the case and its purpose is to expose immediately its unique and preposterous nature. It seeks to obtain federal District Court review of two state judgments, one now pending in the Supreme Court of Alabama, and to enjoin the orderly progress of common law libel actions in state courts. It seeks all of this when the only averred act against the petitioners is the libel litigation which may be fully and adequately reviewed in established appellate channels. The complaint strikes, moreover, at the vitals of the historically delicate accommodation of state and federal judicial systems, all in violation of the prohibition which Congress imposed by 28 U. S. C. 2283.

ARGUMENT.

The Court of Appeals correctly affirmed the dismissal of this complaint by the District Court. It was perfectly clear to those Courts, as it will be to this Court, that this case is no more novel or complicated than the postulate that cases begun in state courts must be allowed to pass through appellate processes, free from federal interference, with review ultimately in this Court of any federal question properly preserved and presented. The simple and sole question is whether a federal court may enjoin state damage suits for libel already commenced—one case having been submitted in the state Supreme Court for decision and another pending on motion for a new trial. What these petitioners sought in their complaint was to take the judgments of the Alabama trial court for review, not to the Supreme Court of Alabama, but to the federal District Court.

There is no conflict of decisions; the questions raised by the petitioner are not of general importance, but are easily answered by these long-settled axioms.

1. The Court of Appeals searched the complaint in vain for any averment of any overt act of any respondent which was said to have deprived any petitioner of any asserted constitutional right, other than the assertion that private libel suits had been commenced, had been reduced to judgment in two instances, and were being collected. All allegations of irreparable damage related to the libel suits, as did the only averment as to the adequacy of legal remedy. The entire prayer for relief concerned the libel judgment. This Court's search of the record and petition for anything else will be equally fruitless.[11]

[11] Of course, the Court of Appeals correctly observed that a "sweeping conclusion cannot be accepted unless it is well supported by specific factual averments" (295 F. 2d at 457). This Court said the same thing in *Ellis v. Dixon*, 340 U. S. 488, 462: "What has

But libelous utterances, as this Court has repeatedly held, are not within the area of constitutionally protected speech and press.[12] Moreover, free speech and press guaranties do not extend to commercial advertising.[13]

Thus, the only alleged controversy between petitioners and respondents involves the questions of whether petitioners had fair trials of the libel actions and whether they have adequate means of appellate review. The Court of Appeals correctly held that these matters go from the Alabama trial court to the Supreme Court of Alabama. Petitioners have conceded (Petition p. 8) that the Alabama decisions cited by the Court of Appeals (295 F. 2d at 457) permit petitioners to be made whole, with interest, if their appellate review is successful. Moreover, the Court of Appeals correctly pointed out that Alabama does not require supersedeas as a prerequisite for appeal.

It is spurious for petitioners to cite **Hague v. C. I. O.**, 307 U. S. 496, as involving allegations "similar to those" contained in the complaint at bar. There the plaintiffs spelled out numerous overt acts of the defendants directed specifically to the plaintiffs themselves, and in many instances undertaken pursuant to a city ordinance held to be unconstitutional. No specification of any such acts, other than the commencement of the libel suits, appears in this complaint.

This Court has recently said that it would not be moved to extraordinary injunctive action where the movants,

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been alleged is entirely too amorphous to permit adjudication of the constitutional issues asserted."

[12] *Roth v. U. S.*, 354 U. S. 476, 483; *Beauharnais v. Illinois*, 343 U. S. 250, 256; *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572; *Konigsberg v. State Bar of California*, 366 U. S. 36, 50; *Near v. Minnesota*, 283 U. S. 697, 715.

[13] *Valentine v. Chrestensen*, 316 U. S. 52, 54; *Breard v. City of Alexandria*, 341 U. S. 622, 642; *Pollak v. Public Utilities Commission*, 191 F. 2d 450, 457 (D. C. Cir. 1951); *Drew and Co. v. F. T. C.*, 235 F. 2d 735, 739-740 (2d Cir. 1956).

themselves, were not involved in the state acts said to be unconstitutional. **Bailey v. Patterson**, 30 U. S. L. Week 3201, decided December 12, 1961.

And this Court reiterated in **Poe v. Ullman**, 367 U. S. 497, 6 L. Ed. 2d at 996, that constitutional questions are decided within the framework of an adjudicatory process "exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity."

2. The Court of Appeals, having found that petitioners stated no claim which entitled them to the injunctive relief sought, did not decide the "delicate and important questions of federalism as might . . . be presented by the application of the anti-injunction statute, 28 U. S. C. A., § 2283, and its related judicial rule of comity." (295 F. 2d at 456.) *Had the Court of Appeals gone this far*, it would undoubtedly have found that the relief sought was clearly prohibited by that statute.[14]

This Court has termed a "lodestar of adjudication" the principle that proper consideration for state judicial systems in the construction and application of the Civil Rights Act, while vital when attempts to stop the commencement of state judicial proceedings come before the federal courts, is much "more cogent . . . to prevent federal interference with proceedings once begun." **Stefanelli v. Minard**, 342 U. S. 117, 121 and 122-123.[15] Section 2283

[14] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Petitioners do not suggest that any statutory exceptions exist when they seek to enjoin pending state private libel actions.

[15] When the 7th Circuit decided, *Progress Development Corp. v. Mitchell*, 286 F. 2d 222, it recognized this crucial distinction and emphasized that the jurisdiction of the federal courts was there invoked first by the plaintiffs. Petitioners may not approve of the principle (p. 10), but it is nevertheless well embedded.

represents the strongest expression of the traditional reluctance of a federal court to interfere in state court proceedings, and by it, "Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." **Amalgamated Clothing Workers v. Richman Brothers**, 348 U. S. 511, 514.[16]

This Court in **Leiter Minerals, Inc., v. U. S.**, 352 U. S. 220, 225-226, characterized this statute as "designed to prevent conflict between federal and state courts." During its last term this Court would not permit federal interference by injunction in state criminal proceedings. **Pugach v. Dollinger**, 365 U. S. 458, and **Wilson v. Schnettler**, 365 U. S. 381, 385.[17] Nor would it this term in **Bailey v. Patterson**, 30 U. S. L. Week 3201.

Many earlier decisions, culminating in **Toucey v. New York Life Insurance Co.**, 314 U. S. 118, stand undeviatingly for these principles now embodied in legislation. Among them are **Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.**, 309 U. S. 4, 8-9; **American Surety Co. v. Baldwin**, 287 U. S. 156; **Kline v. Burke Construction Co.**, 260 U. S. 226; and **Hill v. Martin**, 296 U. S. 393.

Moreover, no exception to this statute and its underlying considerations exists simply because a federal injunction is sought under the Civil Rights Act. See **Bailey v. Patterson**, 30 U. S. L. Week 3201; **Stefanelli v. Minard**, 342 U. S. 117; **Pugach v. Dollinger**, 365 U. S. 458; **Wilson**

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[16] There this Court, though assuming "that the conduct in controversy is subject to whatever relief the Taft-Hartley Act may afford and therefore is outside state authority" (348 U. S. at 514), nevertheless refused to allow a federal injunction against a state court action in a labor matter, and held that such federal interference was prohibited by Title 28, § 2283 as "continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflict between state and federal courts" (348 U. S. at 518).

[17] "We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them."

v. Schnettler, 365 U. S. 381; and **Amalgamated Clothing Workers v. Richman Brothers,** 348 U. S. 511.[18] Congress in varied contexts has shown that when it grants federal courts the power to stay state court proceedings, it knows how to do so expressly.[19] The courts below knew that the relief which petitioners sought would have required an injunction in the very teeth of § 2283 to restrain and review private litigation pending in the state courts of Alabama.

3. Quite apart from the anti-injunction prohibition, petitioners seek federal interference in private libel litigation under the guise of the Civil Rights Acts. It is elemental that private action is outside the scope of these acts. **Collins v. Hardyman,** 341 U. S. 651; **U. S. v. Cruikshank,** 92 U. S. 542. And Courts of Appeals have uniformly rejected the claims of disappointed state litigants who want to retry state civil actions on federal allegations of conspiracy and fraud.[20]

Even if this complaint had not sought an injunction against pending state court proceedings, it stated no cause of action under the Civil Rights Act when it complained of the outcome of a private state libel suit for damages.

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[18] The absence of any such exception has been clearly spelled out by lower federal courts. See e. g. *Sexton v. Barry,* 233 F. 2d 220 (6th Cir. 1956); *Smith v. Village of Lansing,* 241 F. 2d 856 (7th Cir. 1957); *Aultman & Taylor Co. v. Brumfield,* 102 Fed. 7 (N. D. Ohio 1900); *Island Steamship Lines v. Glennon,* 178 F. Supp. 202 (D. Mass. 1959).

[19] See e. g. Interpleader (28 U. S. C. 2361); Habeas Corpus (28 U. S. C. 2251); Bankruptcy (11 U. S. C. 29); Frazier-Lemke Farm Mortgage Act (11 U. S. C. 203) (s) (2).

[20] *Hanna v. Home Insurance Co.,* 281 F. 2d 298 (5th Cir. 1960); *Curry v. Ragan,* 257 F. 2d 449 (5th Cir. 1958); *Lyons v. Dehon,* 188 F. 2d 534 (5th Cir. 1951); *Bottone v. Lindsley,* 170 F. 2d 705 (10th Cir. 1948); *Campo v. Niemeyer,* 182 F. 2d 115 (7th Cir. 1950); *Moffett v. Commerce Trust Co.,* 187 F. 2d 242 (8th Cir. 1951); *Sexton v. Barry,* 233 F. 2d 220 (6th Cir. 1956); *H. J. Heinz v. Owens,* 180 F. 2d 505 (9th Cir. 1951).

While without significance on the merits of the foregoing cases, it is perhaps worth noting that this Court denied certiorari in each case in which review was sought here.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, M. Roland Nachman, Jr., of Counsel for Respondents and a member of the bar of this Court, hereby certify that I have mailed copies of the above and foregoing Brief, Air Mail, postage prepaid, addressed to Messrs. Cotton, Fruchtman and Watt, 105 West Adams Street, Chicago 4, Illinois, and regular mail to Charles S. Conley, Esq., 530 South Union Street, Montgomery, Alabama, as Counsel for Petitioners.

This ..... day of January, 1962.

.....

M. Roland Nachman, Jr.,
Of Counsel for Respondents.

APPENDIX A.

Title 7, § 276, Code of Alabama of 1940, as amended, which provides:

"Sec. 276: New trial, causes for.—On motion filed within thirty days from entry of judgment a new trial may be granted in the following causes:

"Irregularity in the proceedings of the court, jury, or prevailing party, or any order of court, or abuse of discretion, by which the party was prevented from having a fair trial.

"Misconduct of the jury or prevailing party.

"Accident or surprise, which ordinary prudence could not have guarded against.

"Excessive or inadequate damages.

"Error in the assignment of the amount of recovery, whether too large or too small where the action is upon a contract or for the injury or detention of property.

"That the verdict or decision is not sustained by the great preponderance of the evidence, or is contrary to law.

"Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

"Error of law occurring at the trial and excepted to by the party making the application. And the court, in granting new trials, may allow the same at the costs of the party applying therefor, or in the costs abiding the event of the suit, or a portion of the costs, as the justice and equity of the case may require, taking into consideration the causes which may make such new trial necessary."

Title 7, § 792, Code of Alabama of 1940, as amended, which provides:

"Sec. 792. Security for costs; when required.—An appeal may be taken without giving bond to supersede the execution of the judgment or decree, by the appellant giving security for costs of such appeal, to be approved by the clerk, register, or judge of probate; the names of the surety or sureties to be certified with the record to the appellate court; and execution may issue against such sureties for the costs in such court and the costs of the transcript, if decided against the appellant."

Title 7, § 793, Code of Alabama of 1940, as amended, which provides:

"Sec. 793. Supersedeas bond in general.—When the judgment or decree is for the payment of money only, the appeal does not operate as a supersedeas, or to stay or suspend the execution of such judgment or decree (except in such cases as are otherwise provided), unless bond be given by the appellant, or some other person, in double the amount of the judgment or decree, including costs, payable to the appellee, with sufficient sureties, and with condition to prosecute the appeal to effect, or, if he fails therein, to satisfy such judgment as the appellate court may render in the premises."

Title 7, § 794, Code of Alabama of 1940, as amended, which provides:

"Sec. 794. Supersedeas bond, when judgment or decree for payment of money, and for other acts.—If the decree or judgment be for the payment of money, and also for the performance of some other act or duty, or for the recovery of property, real or personal, or the possession thereof, or for the sale of property, real or personal, and the party appealing wishes to supersede the execution of such judgment or decree,

he must, unless otherwise provided, give bond with good and sufficient sureties, payable to the party recovering the judgment or decree, in double the amount of the money, with condition to prosecute to effect the appeal, or, if he fails therein, to pay such judgment as the appellate court may render in the premises, and must also execute bond with good and sufficient sureties, payable to the clerk or register, in such sum as the judge may in writing prescribe, with condition to pay all such costs and damages as any party aggrieved may sustain by reason of the wrongful appeal and suspension of the execution of the judgment or decree; or if the party appealing wishes to supersede the judgment or decree as to the payment of the money only, the bond first above mentioned may be executed, suspending the judgment or decree in that respect only; or if the party appealing wishes to supersede the execution of the judgment or decree in the other respect only, the bond secondly above mentioned may be executed, superseding the execution of the judgment or decree in that respect only."